

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JAMES CARR,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,
Defendant.

Civ. No. 07-1181-TC

ORDER AND OPINION

Coffin, Magistrate Judge:

Before the court is plaintiff's Complaint (#2) and Brief (#10) seeking review of the denial of Supplemental Security Income disability benefits under 42 U.S.C. §§ 1381-83f.¹ For the reasons that follow, the decision of the Commissioner is reversed and remanded for further proceedings.

BACKGROUND

Plaintiff, 48 years old at the time of the decision of the

¹ Plaintiff does not argue in his brief that he appeals from denial of a claim for disability insurance benefits, and the court understands plaintiff to appeal from denial of SSI only.

1 ALJ at issue in this case,² is GED qualified and has worked
2 various part-time jobs between 2002 and 2006. He suffered a
3 gunshot wound to the chest in 1997. In September, 2004, he
4 applied for social security benefits based on several
5 impairments, including chest pain, bilateral arm pain, bilateral
6 shoulder pain, inability to stand for extended periods, memory
7 deficiencies, shortness of breath, abdominal pain, having to rest
8 after walking roughly four blocks, and having to lie down for
9 approximately 90 minutes during the day. Tr. 168-89. He has
10 been diagnosed with chest pain and shortness of breath with
11 exertion, status post gunshot wound to the chest, and strain.
12 Tr. 121, 146.

13 Plaintiff underwent two consultative physical examinations.
14 After a November 14, 2004, examination, Dr. Rima Chamie reported
15 these findings:

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17 Chest pain and shortness of breath with exertion.
18 It is unclear to me whether this has a cardiac
19 cause, a pulmonary cause, or it is his abdomen from
20 the incision versus reflux. Part of what he is
21 describing is consistent with angina, but this would
take significant further workup than is available
for me today to determine. The number of hours the
claimant could be expected to stand and walk in an
eight hour workday is eight. However, he does need

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23 ² Plaintiff filed applications for disability insurance and
24 Supplemental Security Income disability benefits in 2001 alleging
25 disability since September 1, 2000, due to chest pain. The
26 Commissioner found plaintiff not disabled through the date of the
27 ALJ's decision (November 26, 2002), and this court affirmed. Carr v.
28 Commissioner, No. 03-CV-00517-KI (D. Or., Mar. 10, 2004). The
doctrine of res judicata bars reconsideration of the period covered by
the Commissioner's 2002 decision. Lester v. Chater, 81 F.3d 821, 827-
28 (9th Cir. 1996). Thus, although in the current case, plaintiff
alleges onset of disability that precedes November 26, 2002, the
relevant period post-dates the ALJ's 2002 decision. Plaintiff's
physical examinations that form the part of the record relevant for
purposes of this opinion occurred after November 26, 2002.

1 a medical examination to see if this is angina or
2 heart failure that he is experiencing. If it is, he
3 could have quite a few restrictions. . . . If he
4 could be experiencing angina, it would need to be
5 fully evaluated before a diagnosis and Disability
6 Evaluation could be complete.

7 Tr. 121-22.

8 Dr. James Borden examined plaintiff on December 16, 2006.
9 Tr. 124. Plaintiff underwent a physical examination, including
10 treadmill testing, and Dr. Borden reviewed Dr. Chamie's report.

11 Tr. 123-24. Dr. Borden could not discern the cause of
12 plaintiff's symptoms. He stated,

13 At this point, I cannot say that it is heart any
14 way. It does not seem to be heart based on his
15 history, based on his exam, and based on the good
16 treadmill. I think it would be nice to have a
17 cardiologist review the tracings, and a thallium
18 exam might confirm it a bit more.

19 Tr. 124.

20 Plaintiff testified that his chest pain, shoulder pain, and
21 shortness of breath prevented him from working, Tr. 180-81, and
22 he explained that he could not return to his past work as an
23 order filler because "my mind expands, and my memory's getting
24 bad." Tr. 188. Plaintiff has a history of using alcohol,
25 cigarettes, and cocaine. Tr. 123, 183-84.

26 The administrative law judge (ALJ) employed the five-step
27 process used to determine whether a claimant is disabled. See 20
28 C.F.R. §§ 404.1520, 416.920. At step one, the ALJ concluded that
plaintiff had not engaged in substantial gainful activity since
the alleged date of disability onset. Tr. 12. At step two, the
ALJ concluded that plaintiff had no severe impairment. Tr. 15.
The ALJ further concluded at step three that plaintiff's alleged
impairments did not meet or medically equal the requirements of
3 Opinion and Order

1 a listed impairment based on 20 C.F.R. §§ 404.1520(c),
2 416.920(c); that plaintiff could perform "medium work" under 20
3 C.F.R. Pt. 404, Subpt. P, App. 1.; and, at step four, that
4 plaintiff could perform past relevant work as a packager and as
5 an auto detailer. Tr. 15-20. Accordingly, the ALJ found that
6 the plaintiff was not disabled. Plaintiff's request for review
7 before the Appeals Counsel was denied. Tr. 4-7.

8 Plaintiff disputes the ALJ's findings at steps two through
9 five of the five-step sequential evaluation. In particular,
10 plaintiff asserts that the ALJ erred in failing to develop the
11 record concerning a cause and diagnosis for plaintiff's chest
12 pain, and in disregarding plaintiff's subjective symptom
13 testimony. Because my order to reverse and remand for further
14 proceedings rests on the conclusion that the ALJ erred in her
15 determination concerning plaintiff's lack of any severe
16 impairment at step two, my analysis focuses on that error.

17 18 ANALYSIS

19 Plaintiff contends that the ALJ erred at step two because
20 the ALJ failed to develop the record regarding plaintiff's chest
21 pain. As I explain below, the ALJ neglected her duty to develop
22 the record. Because the medical evidence may change once the
23 record is developed upon remand, and because such evidence would
24 implicate the ALJ's decision to disregard plaintiff's subjective
25 symptom testimony,³ review of this asserted error at this stage
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27 ³ When considering a claimant's subjective symptom testimony, and
28 ALJ first looks to objective medical evidence of an underlying
impairment that could reasonably be expected to produce some degree of
symptom, and where such evidence exists and the record does not show

1 is premature in light of my decision to remand the case.

2 "The ALJ in a social security case has an independent duty
3 to fully and fairly develop the record and to assure that the
4 claimant's interests are considered." Tonapetyan v. Halter, 242
5 F.3d 1144, 1150 (9th Cir. 2001) (internal quotation marks and
6 citations omitted). "Ambiguous evidence . . . triggers the ALJ's
7 duty to conduct an appropriate inquiry." Id. In addition, an
8 ALJ's duty is triggered when the record is inadequate to allow
9 for a proper evaluation of the evidence. Mayes v. Massinari, 276
10 F.3d 453, 459-60 (9th Cir. 2001). The ALJ has several options
11 for discharging this duty, including "subpoenaing the claimant's
12 physicians, submitting questions to the claimant's physicians,
13 continuing the hearing, or keeping the record open after the
14 hearing to allow supplementation of the record." Tonapetyan, 242
15 F.3d at 1150.

16 In this case, the ALJ's duty to develop the record was
17 triggered. Both doctors expressed concern about the etiology of
18 plaintiff's chest pain. Dr. Chamie specifically explained that
19 plaintiff's chest pain required further investigation as a
20 prerequisite to determining a diagnosis and the types of
21 limitations that might apply: "he does need a medical examination
22 to see if this is angina or heart failure that he is
23 experiencing. If it is, he could have quite a few restrictions."
24 She directly stated that if plaintiff's pain was associated with
25 angina, "it would need to be fully evaluated before a diagnosis
26 and Disability Evaluation could be complete." Tr. 121-22. The

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malingering, the ALJ may discredit the claimant by giving specific,
clear, and convincing reasons supported by substantial evidence.
Thomas v. Barnhart, 278 F.3d 947, 958-59 (9th Cir. 2002).

1 ALJ took note of Dr. Chamie's opinion that determining the cause
2 of plaintiff's symptoms "would require a significant further
3 work-up[.]" Tr. 15.

4 Dr. Borden evaluated plaintiff and considered Dr. Chamie's
5 report, which led him to question whether plaintiff's pain was
6 heart-related, but he also indicated that further review would be
7 required to settle on a diagnosis: "it would be nice to have a
8 cardiologist review the tracings, and a thallium exam might
9 confirm it a bit more." Tr. 124.

10 At minimum, the record gives rise to ambiguity concerning
11 whether it is possible to rule out angina or a cardiac condition,
12 as the ALJ implicitly did. The conclusions of the examining
13 physicians point to the need for further investigation in order
14 to discern the cause (and therefore the diagnosis and limitations
15 imposed by) of plaintiff's condition. The ALJ erred in
16 concluding that claimant's condition is nonsevere based on the
17 rationale that Dr. Borden "could offer no diagnosis for
18 claimant's symptoms." Tr. 15. Reversal and remand is warranted
19 on this basis. See Tonapetyan, 242 F.3d at 1151 (reversing and
20 remanding upon determination that administrative record is
21 incomplete).

22 23 CONCLUSION

24 The decision of the Commissioner is reversed and remanded
25 for further proceedings.

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2 IT IS SO ORDERED.
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5 Dated this 21 day of May, 2008.
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9 THOMAS M. COFFIN
10 United States Magistrate Judge
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